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8 Attorneys for Federal Defendant  
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9 UNITED STATES DISTRICT COURT  
10 NORTHERN DISTRICT OF CALIFORNIA  
11 SAN FRANCISCO DIVISION

12 DAVID MCKEW,

13 Plaintiff,

14 v.

15 SAN FRANCISCO MUNICIPAL  
RAILWAY, UNITED STATES POSTAL  
16 SERVICE, MELVIN WASHINGTON,

17 Defendants.  
18

Case No. 07-3620 EDL

**STIPULATION AND PROPOSED  
ORDER**

19 THE PARTIES TO THIS MATTER HEREBY STIPULATE AS FOLLOWS:  
20

- 21 1. Pending before the Court is a motion to dismiss ("the Motion") without prejudice,  
22 filed by the defendant United States Postal Service for failure to exhaust  
23 administrative remedies before filing suit.
- 24 2. The parties request that the Court grant the Motion without prejudice. See, e.g.,  
25 Jerves v. U.S., 966 F.2d 517, 521 (9<sup>th</sup> Cir. 1992) ("Section 2675(a) establishes  
26 explicit prerequisites to the filing of suit against the Government in district court. It  
27 admits of no exceptions."); Burns v. United States, 764 F.2d 722, 723 (9<sup>th</sup> Cir. 1985)  
28 ("The claim requirement of section 2675 is jurisdictional in nature and may not be

waived.”); Spawr v. United States, 796 F.2d 279, 280 (9<sup>th</sup> Cir. 1986) (“28 U.S.C. § 2675(a) specifies that a suit may not be instituted against the United States unless it is first presented to the appropriate federal agency and either finally denied or permitted to languish for six months without resolution. This claim requirement is jurisdictional in nature and may not be waived.”)

3. The parties further request that the Court remand the remaining claims and parties to the San Francisco Superior Court, pursuant to 28 U.S.C. section 1447(c) states, in pertinent part: “If at any time before final judgment it appears that the district court lacks subject-matter jurisdiction, the case shall be remanded.” See Page v. City of Southfield, 45 F.3d 128, 133 (6<sup>th</sup> Cir. 1995); In re Allstate Ins. Co., 8 F.3d 219, 233 (5<sup>th</sup> Cir. 1993).

**SO STIPULATED.**

DATED: October 19, 2007

KERN, NODA, DEVINE & SEGAL

/s/  
Phillip A. Segal, Esq.  
ATTORNEYS FOR PLAINTIFF

DATED: October 17, 2007

SAN FRANCISCO CITY ATTORNEY’S OFFICE

/s/  
David Newdorf, Esq.  
Deputy City Attorney  
ATTORNEYS FOR DEFENDANTS MUNICIPAL  
RAILWAY

DATED: October 19, 2007

UNITED STATES ATTORNEY’S OFFICE

/s/  
Jonathan U. Lee  
Assistant United States Attorney  
ATTORNEYS FOR UNITED STATES POSTAL  
SERVICE

**PROPOSED ORDER**

**IT IS SO ORDERED.**

The United States Postal Service's motion to dismiss is granted without prejudice. The remaining claims and parties are remanded to the Superior Court in and for San Francisco County.

Date: October \_\_, 2007

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Elizabeth D. Laporte  
UNITED STATES MAGISTRATE JUDGE